No. 10901

In the United States Circuit Court of Appeals for the Ninth Circuit

CHESTER BOWLES, ADMINISTRATOR, OFFICE OF PRICE ADMINISTRATION, APPELLANT

v.

SANDEN AND FERGUSON COMPANY, A MONTANA CORPORATION, APPELLEE

APPELLANT'S BRIEF

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JURISDICTION

This is an appeal by the Price Administrator from a judgment of the United States District Court for the District of Montana, Helena Division, dismissing an action brought under Sections 205 (f) (2) and (205) (a) of the Emergency Price Control Act of 1942 (56 Stat. 23, 50 U. S. C. App. Sec. 925) to suspend defendant's license to sell certain commodities or in the alternative to restrain defendant from violating the Act and Regulations issued thereunder (R. 95–96). The judgment dismissing the action was entered July 5, 1944. Notice of appeal was filed September 11, 1944 (R. 97). Jurisdiction of the District Court was invoked under Sections 205 (c) and 205 (f) (2)

of the Act (50 U. S. Code App. § 925 (c) and (f) (2)) and jurisdiction of this Court is invoked under Section 128 of the Judicial Code (28 U. S. Code 225).

Provisions of the Act and Regulations

Section 2 of the Act authorizes the Price Administrator, whenever in his judgment, the price or prices of a commodity or commodities have risen or threaten to rise to an extent or in a manner inconsistent with the purpose of the Act, to establish, by regulation or order, such maximum price or prices as in his judgment will be generally fair and equitable and will effectuate the purposes of the Act. The section further provides the method by which such regulations and orders shall be drawn and become effective.

Section 202 (b) authorizes the Administrator, by regulation or order, to require any person who is engaged in the business of dealing with any commodity to furnish information and to make and keep records and other documents, and to make reports, and to permit the copying of records and other documents.

By Section 205 (f) (1), the Administrator is authorized to require "a license" of any person subject to a maximum price regulation or order as a condition to selling such commodities.

By Section 2 (a), it is made unlawful for any person to sell or deliver any commodity, or otherwise to do or omit to do, any act, in violation of any regulation or order under Section 2, supra, or of any regu-

lation, order, or requirement under Section 202 (b), supra.

Section 205 (f) (2) provides that whenever in the judgment of the Administrator a person has violated any of the provisions of a license issued under Section 205 (f) (1), or has violated any of the provisions of any regulation, order, or requirement under Section 2 or Section 202 (b), a *warning notice* shall be sent by registered mail to such person. If the Administrator has reason to believe that such person has again violated any of such warning notice, he may petition the court for an order suspending the license of such person for a period of not more than twelve months.

SEC. 205 (a) provides "Whenever in the judgment of the Administrator any person has engaged or is about to engage in any acts or practices which constitute or will constitute a violation of any provision of section 4 of this Act, he may make application to the appropriate court for an order enjoining such acts or practices, or for an order enforcing compliance with such provision, and upon a showing by the Administrator that such person has engaged or is about to engage in any such acts or practices a permanent or temporary injunction, restraining order, or other order shall be granted without bond."

The General Maximum Price Regulation (7 F. R. 3153, 3330) was issued April 28, 1942. It became effective as to wholesalers on May 11, 1942, and as to retailers on May 18, 1942.

Section 1499.1 of the regulation provides in part as follows:

> *Prohibition against dealing in commodities or services above maximum prices.*—On and after the effective date of this General Maximum Price Regulation, regardless of any contract or other obligation:
>
> (a) No person shall sell or deliver any commodity, and no person shall sell or supply any service, at a price higher than the maximum price permitted this General Maximum Price Regulation;

Section 1499.2 provides in part as follows:

> *Maximum prices for commodities and services: General provisions.*—Except as otherwise provided in this General Maximum Price Regulation, the seller's maximum price for any commodity or service shall be:
>
> (a) In those cases in which the seller dealt in the same or similar commodities or services during March 1942:
>
> The highest price charged by the seller during such month—
>
> (1) For the same commodity or service; or
>
> (2) If no charge was made for the same commodity or service, for the similar commodity or service, most nearly like it; or
>
> (b) In those cases in which the seller did not deal in the same or similar commodities or services during March 1942:
>
> The highest price charged during such month by the most closely competitive seller of the same class—
>
> (1) For the same commodity or service; or

(2) If no charge was made for the same commodity or service, for the similar commodity or service most nearly like it.

Highest Price Charged During March 1942.

For the purposes of this General Maximum Price Regulation, the highest price charged by a seller "during March 1942" shall be:

(a) The highest price which the seller charged for a commodity delivered or service supplied by him during March 1942; or

(b) If the seller made no such delivery or supplied no such service during March 1942 his highest offering price for delivery or supply during that month.

Section 1499.11 provides in part as follows:

Base-period records.—Every person selling commodities or services for which, upon sale by that person, maximum prices are established by this General Maximum Price Regulation, shall:

(a) Preserve for examination by the Office of Price Administration all his existing records relating to the prices which he charged for such of those commodities or services as he delivered or supplied during March 1942, and his offering prices for delivery or supply of such commodities or services during such month; and

(b) Prepare, on or before July 1, 1942, on the basis of all available information and records, and thereafter keep for examination by any person during ordinary business hours, a statement showing:

(1) The highest prices which he charged for such of those commodities or services as he delivered or supplied during March 1942 and his offering prices for delivery or supply of such

commodities or services during such month, together with an appropriate description or identification of each such commodity or service; and

(2) All his customary allowances, discounts, and other price differentials.

SEC. 1499.12. *Current records.*—Every person selling commodities or services for which, upon sale by that person, maximum prices are established by this General Maximum Price Regulation shall keep, and make available for examination by the Office of Price Administration, records of the same kind as he has customarily kept, relating to the prices which he charged for such of those commodities or services as he sold after the effective date of this General Maximum Price Regulation; and, in addition, records showing, as precisely as possible, the basis upon which he determined maximum prices for those commodities or services.

Section 1499.13 (b) provides as follows:

On or before June 1, 1942, every person offering to sell cost-of-living commodities at retail shall file with the appropriate War Price and Rationing Board of the Office of Price Administration a statement showing his maximum price for each such commodity, together with an appropriate description or identification of it. Such statement shall be kept up to date by such person by filing on the first day of every succeeding month a statement of his maximum price for any cost-of-living commodity newly offered for sale during the previous month, together with an appropriate description or identification of the commodity.

By Amendment No. 1 (7 F. R. 3666), issued May 12, 1942, the date "June 1" was changed to "July 1." By Amendment No. 11 (7 F. R. 5192) the date for filing supplements to the cost-of-living commodity statement was changed from "the first day of every succeeding month" to the tenth day. The requirement that supplements be filed each month remained in full force and effect until July 6, 1943, when it was deleted from the regulation by Amendment No. 56 (8 F. R. 9025).

By Section 1499.66 of the regulation, every retailer selling any commodity for which a maximum price was established by the regulation, was granted a license, as a condition of selling any such commodity in accordance with Section 205 (f) (1) of the Act.

By Section 1499.17, it is provided that persons violating any provision of the regulation are subject to the civil enforcement actions provided by the Act, and proceedings for the suspension of licenses.

STATEMENT

The defendant is a Montana Corporation which owns and operates a department store in Helena, Montana. On April 28, 1942, the Price Administrator issued General Maximum Price Regulation (7 F. R. 3153, 3330). It became effective as to retailers, such as the defendant, on May 18, 1942. This Regulation froze prices of commodities at the highest price charged therefor in March 1942 (R. 71–72). It directed sellers to preserve for examination by the Office of Price Administration all existing records showing the prices defendant charged for such com-

modities during that month (R. 73). On the basis of such records, it required the sellers to prepare on or before July 1, 1942, a base period statement "containing all the kinds of commodities that were sold during March 1942, together with their highest prices during that month, and if no sales were made, the highest offering price (hereinafter referred to as" base period statement) (Section 1499.11). This statement was to be made available for inspection by any person during business hours. It also required sellers offering to sell cost-of-living commodities at retail, to file with the appropriate War Price and Rationing Board of the Office of Price Administration a statement showing the maximum price for each such commodity (hereinafter referred to as "cost-of-living commodity"), together with an appropriate description or identification thereof (Section 1499.13 (b), R. 74). This statement was to be supplemented monthly by such information as would keep the Office of Price Administration advised of any changes in the price of cost-of-living commodities (R. 74). Under the Regulation, and pursuant to authority granted by Sec. 205 (f) (1) of the Act,[1]

[1] 205 (f) (1) Whenever in the judgment of the Administrator such action is necessary or proper in order to effectuate the purposes of this Act and to assure compliance with and provide for the effective enforcement of any regulation or order issued or which may be issued under section 2, or of any price schedule effective in accordance with the provisions of section 206, he may by regulation or order issue to or require of any person or persons subject to any regulation or order issued under section 2, or subject to any such price schedule, a license as a condition of selling any commodity or commodities with respect to which such regula-

every retailer selling any commodity for which a maximum price was established by the Regulation, was granted a license as a condition of selling any such commodity. This license was subject to suspension if the provisions of the Regulation were violated.

For more than a half year after July 1, 1942, the time set for filing such a statement, defendant made no effort to prepare a base period statement or a cost-of-living commodity statement, or to post the maximum price of each cost-of-living commodity as it was required to do by the Regulation. As a result, on or about January 14, 1943 a Warning Notice was sent to defendant by registered mail advising of its failure to comply in the respects indicated above (Pltf's Exh. 3, R. 28–30, 119). Defendant finally proceeded to confer with representatives of the plaintiff in Helena and was shown how to prepare his base period and cost-of-living commodity statements (Pltf's Exh. 1 and 2, R. 104, 122–123). Then, in February 1943, about seven or eight months late, the defendant filed its base period statement and cost-of-living commodity statement (Finding 19, R. 77). In March 1943, plaintiff began an investigation to ascertain whether the defendant was complying with the Act and the Regulation (R. 124). Because of practical limitations, no attempt was made to examine

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tion, order, or price schedule is applicable. It shall not be necessary for the Administrator to issue a separate license for each commodity or for each regulation, order, or price schedule with respect to which a license is required. No such license shall contain any provision which could not be prescribed by regulation, order, or requirement under section 2 or section 202.

thoroughly into every department of defendant's store or into every sale made in the departments investigated.

It was simply a "spot" check. The investigation was confined only to a number of departments (R. 163). In each department investigated, the examination disclosed violations of the Act and Regulation. Not only were the goods sold at prices in excess of ceiling prices, but there was no compliance with the Regulation in many other respects. For example, it was found after a comparison of defendant's sales slips for March, 1942, that defendant had listed in its "base" period statement maximum ceiling prices for certain varieties of yard goods in excess of the highest price which it actually sold or offered to sell such merchandise in March, 1942 (See pp. 34–46, infra). Other violations consisted of defendant's failure to supplement its information respecting goods not previously carried (See pp. 30–31, infra); providing inadequate description and identification of the goods on its counters by which a check and comparison could be made by either a potential purchaser or by a representative of the Price Administrator (See pp. 49–50, infra); placing price tags on articles which exceeded the price ceiling shown on the sign which appeared at each of the counters (R. 129); and failing to properly post prices so that they could be plainly seen and understood by the purchasing public (See pp. 52–53, infra). The investigation in March showed that no prices were posted for such cost-of-living commodities as jersey, sharkskin and ticking, yardgoods, and for such commonly used merchandise as bedspreads,

women's and children's dresses, women's shirts, men's overalls, children's hosiery and gloves, and men's work pants (R. 127–128).

As a result of this investigation the instant action was commenced. In brief, the complaint charged the persistent course of unlawful conduct outlined above and in specific detail set forth the nature and extent of each alleged violation (R. 2–27). As relief, the Administrator prayed for a suspension of defendant's license to sell the commodities upon which there were violations, for a period of one year, or in the alternative, for an injunction restraining further violations (R. 26–28).

Defendant's answer denied generally the specific allegations of the complaint. As separate defenses, defendant charged that the Act and Regulation were in violation of the 5th Amendment in depriving the defendant of liberty and of property without due process of law because it would have to close its business if compelled to incur the expense involved in complying with the Act and Regulation; that the Act and Regulation forced the defendant to change its business and cost practices in violation of the 5th amendment; and that there was an unlawful delegation to the Administrator by Congress of its legislative authority in violation of Article 1, Paragraph 1, of the Constitution, if the defendant were compelled to change its business practices and methods (R. 57–61).

On July 5, 1944, after a trial of the issues, the District Court filed its findings of fact and conclusions of law, which sustained the contentions raised

by the defendant (R. 66–95), and entered a judgment refusing to suspend the license of defendant, refusing injunctive relief, and dismissing the action. The Court's attitude to this case may be summarized by its own words, as follows:

> So, I think we will just take it for granted that the bureaucrat * * * must temper the rules to the situation in which the individual finds himself. In other words, they must cut their system in such a way that the man operating a single store, such as here, may operate within his income and with the help he can get. So, we will pass that point. If I am wrong, I am wrong, and we will stand on that statement. It is based on the theory we still live in America; the Constitution still goes (R. 207–208).

The Administrator filed his notice of appeal on September 11, 1944.

SPECIFICATIONS OF ERROR

1. The Court erred in dismissing the complaint "in its entirety, with prejudice."

2. The Court erred in refusing to grant a suspension of defendant's license as prayed for in the complaint.

3. The Court erred in refusing to grant the injunction as prayed for in the complaint.

4. The Court erred in allowing the defendant to challenge the validity of the Regulation in this proceeding. (Paragraph 9 of defendant's answer, R. 58, 59. Findings 18, 21, 22, 23 R. 77–78.)

5. The Court erred in holding that the defendant was relieved from complying with the Act and Regu-

lation because it had operated its business on a cost basis and not on a permanent inventory basis, and that the institution of the inventory basis would be so expensive as to drive the defendant out of business (Finding 23, R. 78–79).

6. The Court erred in holding that if defendant were compelled to furnish in its base period statement and cost-of-living commodity statement all of the information required by the Regulation, the defendant would have to change its business practices, cost practices and methods by installing a permanent inventory system which would cost at least $2,000 and require the defendant to employ two additional bookkeepers and compel the defendant to close its place of business because of the additional expense (Finding 23, R. 78–79).

7. The Court erred in holding that if defendant were compelled to adopt a new system of marking sales slips of merchandise and keeping records of the quality, grades, colors, etc., of merchandise, it would operate to compel changes in its business practices, cost practices and methods contrary to law (Finding 22, R. 78).

8. The Court erred in holding that on or about February 1, 1943, defendant prepared a base period statement, on the basis of all available information and records, showing the highest prices which it charged for such of those commodities as it delivered during March, 1942, its offering price for delivery of such commodities during such month, together with an appropriate description and identification of such

commodities in so far as defendant was able to do so (Finding 15, R. 75–76).

9. The Court erred in holding that in January 1943, prior to preparing its base period statement and its cost-of-living commodity statement, Eugene Sanden, manager of the defendant company, had an understanding with certain officials of the Office of Price Administration that it would be all right for the defendant to prepare said statement by taking the merchandise that was in defendant's store at that time, and pursuant to that understanding the defendant endeavored to list all the merchandise in said store, and did so to the best of its ability (Finding 17, R. 76–77).

10. The Court erred in holding that the defendant was entitled to rely upon the advice alleged to have been orally given him by a subordinate of the Office of Price Administration respecting the preparation of base period statements which information was directly contrary to that declared by the Act, Regulation and written instructions issued by the Office of Price Administration (Finding 17, R. 76).

11. The Court erred in holding that the base period statement and the cost-of-living commodity statement were carefully made by the defendant in an honest effort to meet the requirements of the Regulation (Finding 24, R. 79).

12. The Court erred in holding that the defendant had at all times displayed its ceiling prices for all cost-of-living commodities carried in its store on or near the merchandise and especially visible to customers (Finding 40, R. 93).

13. The Court erred in finding that at no time did the defendant mark up any price on merchandise contained in its store in March 1942 (Finding 26, R. 79).

14. The Court erred in holding that in March 1942, defendant made six sales of gingham, a yard goods, three at 35¢ per yard, and three at 29¢ per yard "but, it is not shown that these were the only sales of gingham made by the defendant in that month" (Finding 27, R. 80).

15. The Court erred in holding that in March 1942, defendant made two sales of denim, one at 29¢ per yard and the other at 39¢ per yard "but it is not shown that these were the only sales of denim made by the defendant in that month" (Finding 28, R. 81–82).

16. The Court erred in holding that in March 1942, defendant made four sales of gabardine, three at 39¢ per yard and one at 85¢ per yard, "but it is not shown that these were the only sales of gabardine made by defendant during March 1942" (Finding 36, R. 89).

17. The Court erred in holding that burlap is not listed in the cost-of-living commodity statement (Finding 32, R. 86).

18. The Court erred in holding that it was not shown in what year the sateen referred to in Plaintiff's Exhibit No. 24 was sold. (Finding 39, R. 92–93.)

19. The Court erred in holding that the defendant has at all times endeavored in good faith to comply with and abide by the provisions of the Act and the Regulations, including the General Maximum Price Regulation and all other Regulations supplemental

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thereto, and intends to and will continue to do so in the future (Finding 41, R. 93).

20. The Court erred in holding that the defendant never engaged in, nor is about to engage in any act or practice contrary to the provisions of the Act and Regulation (Finding 42, R. 94).

21. The Court erred in finding generally each and all of the facts at issue herein in favor of the defendant and against the plaintiff, the Price Administrator (Finding 43, R. 94).

22. The Court erred in denying the motion of appellant to strike certain portions of defendant's answer contained in paragraphs IX and XII thereof (See, Motion to Strike R. 61–64).

23. The Court erred in entering a final judgment of dismissal of the action and the cause of action.

24. The Court erred in entering a final judgment denying to appellant any of the relief prayed for in his complaint and dismissing plaintiff's action.

25. The Court erred in refusing and failing to enter judgment in favor of appellant and against defendant and in failing to grant relief as prayed for in his complaint.

SUMMARY OF ARGUMENT

I

Defendant's objections addressed to the validity of the Act are without merit; those directed to the General Maximum Price Regulations are barred from judicial consideration in this proceeding by the exclusive jurisdiction provisions contained in Section 204 (d) of the Act.

The Supreme Court has ruled that there is no merit to the contention that the Act unlawfully delegates legislative power to the Administrator in allowing him to issue regulations requiring certain records to be kept, posted, and filed. Individual financial injury sustained as a result of such compliance does not for that reason operate as a violation of the constitutional guarantee against uncompensated takings. Any such loss is merely "consequential" resulting from regulatory legislation of general applicability during an emergency war period.

Section 204 (d) is the keystone of the statutory plan for exclusive administrative and judicial review of price regulations. This plan insures the continuity of price control pending completion of statutory review. It provides protection to the public against the rapid and pervasive effects of sporadic and uneven inflationary control. It aids in simplifying enforcement and in making possible flexibility of administration. Section 204 (d) operates to bar in the present proceeding defendant's contention that if it is compelled to comply with the Regulation it would be deprived of property without due process of law. The Supreme Court has so held. Since defendant has failed to employ and exhaust the administrative remedies which are still available, it may not raise the question of or challenge the validity of the Regulations in this court.

II

By refusing to suspend defendant's license or to issue an injunction restraining further violations, the

District Court has condoned defendant's unlawful conduct and encouraged the defendant to continue to flout the Act and Regulation. The District Court was plainly in error in holding that an alleged increase in the cost of conducting defendant's business excused its compliance with the Act. The defendant's consistent defiance and disregard of the Act and Regulation, its vigorous opposition and continued resistance to regulations justified the suspension of its license or at the very least, fully warranted an injunction against further violations.

Point I

Defendant's objections addressed to the validity of the Act and the Regulation are either without merit or are barred by Section 204 (d) of the Act

In the court below the defendant advanced various arguments assailing the constitutionality of the Act and Regulation. We concede that in an enforcement suit the constitutionality of the *Act* as distinguished from the constitutionality of the *Regulation* is open to attack. We will discuss defendant's arguments in the order in which they have been raised.

I. The first contention was that the requirements of the Administrator and the Regulations are in violation of the Fifth Amendment in that "they would deprive the defendant of liberty and property without due process because they would cause it to close its business due to excessive expense." A finding to that effect was made by the Trial Court (Finding of Fact No. 23, R. 78–79).

After the decision of the court below was rendered, the Supreme Court decided the cases of *Bowles* v. *Willingham,* 321 U. S. 503, and *Yakus* v. *United States,* 321 U. S. 414. These decisions completely dispose of the objection that the Act is unconstitutional because persons subject to it may suffer economic loss if compelled to comply with the Act, or because their property may depreciate in value as a consequence of regulation. The court said in the *Willingham* case:

> A member of the class which is regulated may suffer economic losses not shared by others. His property may lose utility and depreciate in value as a consequence of regulation. But that has never been a barrier to the exercise of the police power. *L'Hote* v. *New Orleans,* 177 U. S. 587, 598; *Welch* v. *Swasey,* 214 U. S. 91; *Hebe Co.* v. *Shaw,* 248 U. S. 297; *Pierce Oil Corp.* v. *City of Hope,* 248 U. S. 498; *Hamilton* v. *Kentucky Distilleries Co.,* 251 U. S. 146, 157; *Euclid* v. *Ambler Realty Co.,* 272 U. S. 365; *West Coast Hotel Co.* v. *Parrish,* 300 U. S. 379. And the restraints imposed on the national government in this regard by the Fifth Amendment are no greater than those imposed on the States by the Fourteenth. *Hamilton* v. *Kentucky Distilleries Co., supra; United States* v. *Darby,* 312 U. S. 100. * * *
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> * * * * *
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> A nation which can demand the lives of its men and women in the waging of that war is under no constitutional necessity of providing a system of price control on the domestic front which will assure each landlord a "fair return" on his property. * * *

The argument that compliance with the Act and Regulation will require an expenditure of $2,000, or such other amount as may tend to make it unprofitable for the defendant to continue to operate, or to compel it to operate at a loss, is no different than the argument advanced in *Yakus* v. *United States,* supra. There the defendants were indicted for violating a regulation fixing maximum prices for meats. At the trial they offered to prove that the prices fixed by the Regulation were so low that, no matter how efficient, they could not conduct their business other than at a loss and therefore the effect of the Act and Regulation was to deprive them of property without due process of law. The trial court there excluded the profferred evidence. This ruling was affirmed by the Circuit Court of Appeals for the First Circuit and in turn by the Supreme Court, on the ground that the evidence tended to indicate that the regulation was invalid or otherwise unfair or inequitable, which was a matter reserved exclusively for the Emergency Court of Appeals under section 204 (d) of the Act. This court also has reached a similar conclusion (*Taylor* v. *United States,* 142 F. (2d) 808, 817 (C. C. A. 9th, 1944); *Rosenweig* v. *United States,* 144 F. (2d) 30 (C. C. A. 9th, 1944), cert. den. Nov. 6, 1944).

Here, too, the trial court was bound to accept the Regulation as valid and should have declined to consider whether or not compliance would be too costly or that the Administrator was acting arbitrarily in demanding that the defendant comply. Instead of obeying the statutory mandate, the court substituted its own motions of fairness for those of the Adminis-

trator to whom Congress had entrusted the administration of the Act. The court concluded that the Administrator "must temper the rules" so that the individual "may operate within his income and with the help he can get." The court went on to say "we still live in America, the Constitution still goes" (R. 207–208). Far from being the "Constitutional Way" which had been approved by Congress, the court condoned a course of conduct which ran directly counter to the constitutional procedure set up by Congress. Price fixing, and a regulation designed to effectuate that purpose is not improper or invalid because it is set up on a "class rather than individual basis" (*Bowles* v. *Willingham, supra*).

If the requirements of the regulation were too drastic, adequate provision was made in the Act and Regulation whereby the defendant could obtain adjustment (Sections 203, 204). If the administrator declined to grant an adjustment, the defendant could obtain all the relief to which it was entitled, even to the extent of compelling the Administrator to grant it an adjustment, by availing itself of the remedies provided by sections 203 and 204 of the Act. (*Yakus* v. *United States, supra;* Cf. *Davies Warehouse Co.* v. *Bowles,* 321 U. S. 144, where the protestants successfully indicated their right to an exemption from regulation). This procedure is still available to the defendant.[2] Having failed to exhaust its administrative remedies,

[2] Under Section 106 the Stabilization Extension Act of 1944 (Public Law 383, 78th Cong., 2d Sess.) an application for an adjustment may be made at any time after the issuance of a regulation or at any time after the effective date thereof. (Section 203 (a) as amended.)

the defendant's contention that the Regulation is invalid, or that the Administrator acted arbitrarily in attempting to compel defendant to comply with "expensive" record keeping and other requirements, cannot be raised here. (*Yakus* v. *United States, supra; Myers* v. *Bethlehem Co.,* 303 U. S. 41, 51; *La Verne Co-Op Citrus Ass'n* v. *United States,* 143 F. (2d) 415 (C. C. A. 9th, 1944).

2. The second contention of the defendant is that the requirements of the Administrator and regulations are in violation of the Act, in that they would force the defendant "to make disastrous changes in its business practices, cost practices, and methods which have been established for many years, thus causing the defendant to lose its business and so said requirements are in violation of the Fifth Amendment to the Constitution." (R. 59, 78–79).

The court below thought that compelling compliance in this case would operate to compel changes in defendant's business practices, cost practices and methods contrary to Section 2 (h) of the Act (Finding of Fact No. 22, R. 78).

This objection constitutes an attack upon the validity of the provisions of the regulations compelling defendant to keep adequate books and records from which the Government can determine whether there has been adherence to the Act and Regulations. This objection was beyond the jurisdiction of the District Court to consider. *Yakus* v. *United States, supra.* Consequently, for the purposes of this case, the Regulation must be accepted as valid.

In *Bowles* v. *NuWay Laundry,* 144 F. (2d) 721 (C. C. A. 19th, 1944) it was aptly said on a similar point (p. 748):

> If the hardship recognized by the trial court as constituting the basis for a denial of the injunction are disproportionate to the common burden of a wartime economy the remedy is adequately provided elsewhere, in the Act (Sections 203 (a) and 204 (a) (b) (c) (d) and *not in the trial court.* [Italics added.]

In *United States* v. *Pepper Bros.* 142 F. (2d) 340 (C. C. A. 3rd, 1944), the court had occasion to refer to a variety of situations in which a challenge of a particular regulation was deemed to be within the exclusive jurisdiction of the Emergency Court, and in the course of doing so considered the very argument made by the defendant in this case.

The Court said: (p. 343)

> Thus the question may arise as to whether a regulation operates "to compel changes in the business practices, cost practices or methods, or means or aids to distribution established in any industry, except to prevent circumvention or evasion of any regulation," in violation of the express prohibition of Section 2 (h). * * *
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> But such questions are clearly within the jurisdiction of the Emergency Court of Appeals. See *Davies Warehouse Co.* v. *Bowles,* 321 U. S. 144, 64 S. Ct. 474.

In *Henderson* v. *Burd,* 133 F. (2d) 515 (C. C. A. 2nd, 1943) the court dealt with a similar contention as follows:

> The contention that Schedule 95, as construed by the court, compels changes in business practices established in the industry contrary to section 2 (h) of the Act, 50 U. S. C. #902 (h) is an attack upon the validity of the regulation, of which the Emergency Court of Appeals established by Section 204, 55 U. S. C. 924, has exclusive jurisdiction.

3. The third constitutional objection urged is that if "defendant is compelled to change its business practices and methods, said Administrator is legislating in violation of Article 1, paragraph 1 of the Constitution."

The issue as of whether Congress has unlawfully delegated its authority to the Administrator also was raised, carefully considered and answered in the negative by the Supreme Court in the *Yakus* and *Willingham* cases, *supra*. As the court said in the *Willingham* decision,

> Thus, so far as delegation of authority is concerned, the rent control provisions of the Act, like the price control provisions (*Yakus* v. *United States, supra*), meet the requirements which this Court has previously held to be adequate for peacetime legislation.

The Constitution is not to be interpreted as demanding the impossible or the impracticable. (*Opp. Cotton Mills* v. *Administrator,* 312 U. S. 126, 145.) Within generous boundaries, Congress may create the policy and leave the implementation and execution to the Administrator. The instant Regulation (General Maximum Price Regulation, Section 1499.11 and 1499.13 (b)) requiring records to be kept, posted

and filed are safely within the prescribed limits. Record keeping requirements are the heart and foundation of effective price control. In no other way could the Administrator detect evasion; by no other method could a dealer properly determine his ceiling price; in no other manner could a purchaser know whether a ceiling price was exceeded. In issuing this Regulation, the Administrator was only obeying the will of Congress as expressed in Section 2 (g) of the Act. This section authorizes the Administrator to include in the regulation or order, such provisions as "he deems necessary to prevent the circumvention or evasion thereof." The fact that there is a zone for the Administrator's discretion in determining what measure of information should be provided and how it should be kept and posted for the proper protection of the public and for the effective enforcement of the Act, is not fatal to the power, but merely allows for a sensible and flexible exercise of it. (cf. *Yakus* v. *United States; Bowles* v. *Willingham, supra*).

Point II

The trial court's findings should be set aside since they are contrary to the uncontradicted evidence

Substantially all of the violations recited in the statement of the case (p. 9–11, supra) were uncontradicted. The defendant conceded that violations occurred, but sought to be excused from their consequences because of lack of help, and its own method of keeping books. Nevertheless, in the face of defendant's own admissions, the Court found that the "defendant had never engaged in nor is about to be

engaged in any act or practice contrary to the provisions of the Act or of the regulations" (Finding of Fact No. 42, R. 94). It is well established that findings which run counter to undisputed facts may be set aside, and the appellate court, upon review, may draw its own inferences and conclusions from such facts (*Equitable Life Assur. Soc.* v. *Irelan,* 123 F. (2d) 462, 464 (C. C. A. 9th, 1941); *Kuhn* v. *Princess Lida of Thurn and Taxis,* 119 F. (2d) 704, 705, 706 (C. C. A. 3d 1941); *United States* v. *South Georgia Ry. Co.,* 107 F. (2d) 3 (C. C. A. 5th 1939); *United States* v. *Mitchell,* 104 F. (2d) 343, 346 (C. C. A. 8th 1939).

In view of the court's findings, we are compelled to take up these violations in detail and discuss them in order:

(1) *Neither the base period statement nor the cost-of living commodity statement was filed until February 1943, more than seven months late.*—Under Sections 1499.11 (b) and 1499.13 (b) of the Regulation, as amended, defendant was required to prepare a base period statement and to file a cost-of-living commodity statement with the local War Price and Rationing Board on or before July 1, 1942 (Finding 12, R. 73–75).

The base period statement is a report showing the highest prices which the retailer charged for all of the kinds and qualities of commodities that come under the regulation and which he sold and delivered in March 1942. If he made no sales of a particular commodity during that month, but offered it for sale, then his highest offering price was to be listed. Each com-

modity must be appropriately described or identified (R. 73).

The cost-of-living commodity statement, on the other hand, shows the maximum price for each cost-of-living commodity sold or offered for sale by a retailer at the time the statement was filed, with an appropriate description or identification of each such commodity (R. 74). This statement was required to be filed on or before July 1, 1942, with the same board and was required to be kept up to date by the filing of monthly supplements thereto (R. 75).

Admittedly, on the testimony of Eugene S. Sanden, defendant's Manager, the base period statement was not prepared nor was the cost-of-living commodity statement filed until February 1943, approximately seven or eight months late. The Court below so found (R. 109, Finding 19, R. 77).

Defendant attributed its failure to prepare and file these statements to lack of help in the store. Even if that were a valid excuse, which it is not, the facts in this case utterly failed to support it (R. 107). It was shown that the defendant formerly operated with about 20 employees (R. 226). One employee was lost to the defendant in March 1942, and another in September of the same year (R. 200). It was claimed that other employees were lost thereafter, but the testimony did not show when. In other words, at the time that the two statements were required to be prepared, viz., July 1, 1942, the defendant had lost merely one employee. If the statements had been prepared in time, even under the defendant's method of operation and loose, unorthodox manner of keeping its books, the

task of preparing the statements would not have been costly or difficult. On the contrary, the testimony was that the cost of producing the base period list in a store doing approximately a half million dollars business per year, in May and early June 1942, was the "employee's time of one day, which would amount to about $90" (R. 195). This testimony certainly lent no support to defendant's theory that the time required to comply with the Regulation was inordinate or that the cost was disproportionate to a citizen's obligations to his country in wartime. Naturally, as time lapsed, in view of defendant's incomplete records, it became more difficult to properly prepare the statements. Defendant, however, *cannot claim any advantage from its own delay or its own neglect.* Moreover, upon analysis of the testimony in this regard, it will be apparent that this excuse has no merit whatever.

Upon direct examination, Sanden testified that in March 1942, one of the employees went into defense work in California; that later, in September, his principal man in the store was called into the Army and left him without any help whatever in the Men's Department; that the head girl in the Notions Department went into the WACs; that her assistant took an office job; that the assistant drygoods lady went to the coast and the assistant office girl "went and took a man's place at one of the banks" (R. 200–201).

Upon cross-examination Mr. Sanden testified that defendant had an average of 20 employees; that during the year 1942 it had an average of 20, and likewise that number in 1941 (R. 226). He claimed that

all through 1943 it had from four to five people less. When questioned as to whether it was not a fact that defendant had 24 employees in January 1943, he admitted that such may have been the fact, but that they had been hired for the Holiday Season (R. 226). What these additional employees were doing after the Holiday Season in January he did not explain. He disclaimed any knowledge as to the exact number of employees in February 1943, when asked whether he did not have 24 employees working for him at that time (R. 227). He had it within his power to refer to his books and to refresh his recollection on that score. Why did he not do so? His silence is a sufficient answer.

The burden of providing an adequate excuse for not complying with the Regulation was clearly upon the defendant. It never met that burden. While, as indicated above, one employee was lost in March and another in September 1942, no definite dates were given as to when the others left, nor was it shown how important the lost employees were. It appears that replacements must have been made of those who did leave because the defendant maintained a staff of an average of at least 20 employees throughout 1942. In any event the alleged disadvantage of shortage of help under which defendant labored, even if it be true, was not limited to it. Almost all businessmen have had to cope with similar problems in this emergency period. Shortage of help is a common cry in wartimes but price control cannot wait on it forever, if inflation is to be prevented. We submit that a period of eight months' grace was far more than ade-

quate indulgence within which defendant could have fully complied with the Act and regulation if it exercised just a bit more than mere honorable intentions, and a little less of its "business-as-usual" tactics.

(2) *The defendant also failed to file current monthly supplements of cost-of-living commodity statements.*—Not only did the defendant file its cost-of-living commodity statements about eight months late, but it also failed to file current monthly supplements of such statements, which were likewise required by the Regulation.

The testimony showed a purchase invoice from Butler Brothers dated February 2, 1943, of a shipment of gingham, spun rayon, and gabardine yard goods to defendant (Pltf's Exh. 25, R. 164); a purchase invoice from Yale Fabrics Corp'n dated March 3, 1943, for a shipment of rayon jersey to defendant (Pltf's Exh. 26, R. 166). The gingham is described as lot No. 7318; the gabardine as lot No. 4165 and the spun rayon as lot No. 4175. The jersey did not have a lot number (R. 167–168). The gingham, spun rayon and gabardine were received by defendant several days after February 2, 1943. The rayon jersey was received about March 19, 1943 (answers to interrogatories numbered 8 and 9, Pltf's Exh. No. 27, R. 171). All of these yard goods were placed on sale within several days after their receipt (R. 183–184).

The only gingham yard goods appearing on the cost-of-living commodity statement was purchased from Carsons. No lot number is given to it (R. 116). The only gabardine appearing on such statement was

purchased from Belding. No lot number is given it (R. 147). Jersey and spun rayon were not even listed on the statement at all (R. 149, 144).

To summarize: All of the afore-mentioned yard goods were cost-of-living commodities. The gingham and gabardine were undoubtedly of a different kind and quality from those previously sold by defendant, since the ones described in the statement were from Carsons and Belding. Inasmuch as neither the spun rayon nor jersey were listed in the statement, it cannot be definitely determined whether defendant handled the same makes and qualities before. If it did, they should have been listed in the original cost-of-living commodity statement. If the items were new items they were required to be listed in a supplement thereto. In either event, there was a violation of the Act and Regulation.

Defendant did not deny these violations but sought refuge in the same excuse upon which it had relied in failing to file the original cost of living commodity statement namely, that the number of employees available did not allow adequate time for preparation. Our observations on defendant's utter disregard of the Act and Regulation in failing to file its original cost-of-living statement find further confirmation in defendant's neglect in filing these supplemental cost-of-living commodity statements.

(3) *The defendant either falsified the prices listed in the two statements, or omitted to list in the base period statement the kinds and qualities that were sold at prices appearing in its March 1942 sales*

slips.—When the defendant finally filed its base period statement, referring to prices of commodities as of March 1942, and cost-of-living commodity statement referring to prices of commodities as of February 1943, it was found that the prices in the base period statement and the cost-of-living commodity statement were *exactly alike.* It will be remembered that defendant claimed it had no books or inventory records from which the prices of its various fabrics and commodities could be determined. The sole method by which the Administrator could check the truthfulness of defendant's statements, therefore, was to refer to the sales checks, retained by the defendant, of sales made by it in March 1942. Upon comparison, these sales checks showed a price in almost each instance less than the prices shown in both the base and cost-of-living commodity statements (See pp. 34–46, infra).

There might possibly be some excuse for this disparity if the defendant had handled different commodities in March 1942 (as shown by the sales slips) than it listed in the base period statement and cost-of-living commodity statement. But the contrary was the fact. Sanden testified that in March 1942, the defendant handled the same makes, kinds and qualities of commodities as it did in 1943, with probably a few additional ones handled in 1943 (R. 113). How, then, can the explanation for the amounts in the sales slips be reconciled with the amounts stated in the base and cost-of-living commodity statements? We prefer to believe that defendant did not deliberately falsify its records. If it did not, then at least

there is no way to avoid the conclusion that the defendant failed, and neglected to include the less expensive kinds, qualities, and widths of its commodities in its base period statement, in violation of Section 1499.11 of the Regulation. If, on the other hand, the brands, qualities, prices, and sizes of commodities were accurately and correctly stated in the statements, then the testimony which Sanden gave that the brands and qualities were the same as those in March 1942, and also the statement made in the base and cost-of-living commodity statement to that effect, were untrue.

Obviously both accounts of what transpired cannot be true. In either event, whether this Court accepts one story or the other, there was a violation.

We point to still another possible violation in this regard. It is agreed that if a merchant handled the same commodities when a cost-of-living commodity statement was filed, as he did in March 1942, then the base and commodity statements would be the same. However, if he changed the brand or quality of commodities after March 1942, he was required to price such different commodities under one of the methods outlined in the regulation. If the commodity was similar to one handled in March, then he was to take the price of the similar commodity. If he handled a dissimilar commodity in March 1942, he was required to take the price of his most closely competitive seller of the same class for (1) the same commodity, or (2) if the competitor did not handle the same commodity, then for a similar commodity (Section 1499.1 (R. 71)). If a seller was unable to arrive at

a maximum price under one of the aforementioned methods, he was required to determine his price by a formula set forth in Section 1499.2 and to report such price to the Office of Price Administration (R. 71–72). To enable a merchant to conform with the Regulation, Section 1499.12 required each seller to keep records showing as precisely as possible the basis upon which he determined his maximum prices for commodities sold after the effective date of regulation (R. 73–74). Defendant also failed to comply with the law in this respect.

It thus clearly appears that there was no basis for Finding of Fact #24 that the base period statement and cost-of-living commodity statement were "carefully made by the Defendant in an honest attempt to meet the requirements of said General Maximum Price Regulation" (R. 24). There was certainly no care taken whatever, and the only evidence of an "honest attempt" to meet the requirements is to be found not from defendant's conduct but from his words. Obviously, these were not enough.

(4) *The defendant sold many commodities, such as Gingham, Denim, Challis, etc., at prices in excess of ceiling.*—It will be noted from what follows that in every department investigated, violations were found. We shall now discuss the specific violations in each department:

A. *Gingham, Yard Goods (Prg. XIII, d (1), d (2), d (3) of Complaint R. 11–12).*—The testimony showed that there were 6 sales made of Gingham in March of 1942, three at 35¢ per yard and three at 29¢ per

yard (R. 135). For three sales in February 1943 the price was 39¢ per yd., and in March 1943 the selling price was 39¢ per yd. (Pltf.'s Exh. 5 and 6, consisting of sales slips, R. 138, 140).

Only one item of Gingham was listed on the base period and cost-of-living commodity statement, described as follows (R. 139):

Article: Gingham. Style No.: Golden Rod. Mfgr.: Carsons. Max. Price: $0.39.

It was shown that the selling price of Gingham in 1943 was 39¢ per yd. (R. 128).

To summarize: The sales slips disclose that 35¢ per yd. was the highest price at which Gingham sold in March 1942. Other sales were made at 29¢ per yd. The only Gingham listed in the two statements had a maximum price of 39¢ per yd. Thus defendant was in violation:

(a) for failing to list the kind and quality of Gingham that sold at 35¢ per yd. in its base period statement;

(b) for listing Carsons' Golden Rod Gingham in its statements as having a maximum price of 39¢ per yd., when the maximum price should have been 35¢ per yd.;

(c) for having sold and offered for sale Gingham in February and March 1943, at 39¢ per yd.

B. Denim, Yard Goods (Prg. XIII, e (1), e (2), e (3) of Complaint R. 13–14).—The testimony shows that two sales of Denim were made in March 1942, one at 39¢ per yd. and the other at 29¢ per yd. (Pltf.'s Ex. #7, consisting of 2 sales slips, R. 141).

Only two items of Denim were listed on the base-period and cost-of-living commodity statements, described as follows (Tr. of p. 35, L. 11–25):

Article	Style lot	Manufacturer	Description	Maximum price
Denim	5028	Schenck	Colored	$0.45
Denim	Overall	Butler	Blue	.35

It was shown that 6 sales of Denim were made in February 1943, at 29¢, 35¢, and 45¢ per yd. (Pltf.'s Exh. 8, consisting of 6 sales slips, R. 142).

The selling price of Denim in March, 1943, was: Colored Denim, 45¢ per yd.; Blue Overall Denim, 35¢ per yd. (R. 129).

To summarize: The sales slips disclose that 39¢ per yd. was the highest price at which Denim sold in March 1942. One other sale was made at 29¢ per yd. Only 2 Denims were listed in the two statements, one Colored Denim having a maximum price of 45¢ per yd., the other Blue Overall Denim having a maximum price of 35¢ per yd. The defendant was in violation;

1. In having failed to list in its base period statement the kind and quality of Denim that sold in March 1942, at 39¢ per yd.

2. In having listed Colored Denim purchased from Schenck in its base period statement and cost-of-living commodity statement as having a maximum price of 45¢ per yd., where the maximum price should have been 39¢ per yd.

3. In selling and offering to sell in February and March 1943, Denim at 45¢ per yd., when the allowable maximum price was 39¢ per yd.

(c) *Challis, a yard goods (Par. XIII, f (1), f (2), and f (3) of Complaint,* R. 13–14).—The testimony showed that the one sale of challis was made in March 1942 at 25¢ a yard (Pltf's Exh. No. 9, R. 143).

Only one item of challis was listed on the base period and cost-of-living commodity statement and was described as follows (R. 144):

Article: Challis. Style Lot: 5904. Manuf.: CPS. Description: Figured. Maximum price: 32¢.

The selling price of challis in March 1943 was 32¢ per yard (R. 129).

To summarize: The sales slips disclosed that 25¢ per yard was the highest price at which challis sold in March 1942. The only challis listed in the two statements had a maximum price of 32¢ per yard. Defendant was in violation:

(1) in having failed to list in its base period statement the kind and quality of challis that sold in March 1942 at 25¢ per yard;

(2) in having listed figured challis lot No. 5904 in its two statements as having a maximum price of 32¢ per yard when the maximum price should have been 25¢ per yard; and

(3) In offering to sell challis in March 1943 at 32¢ per yard, as well as in having sold challis at 32¢ per yard in March 1943, whereas the ceiling price was 25¢ per yard.

(d) *Gabardine, a yard goods (par. XIII, i (1), i (2) and i (3) of Complaint,* R. 17–18).—The testimony disclosed that, in March 1942, four sales of gabardine were made, three at 39¢ per yard and one at 85¢ per yard (Pltf's Exh. 13, R. 146).

Only two items of gabardine were listed on the base period and cost-of-living commodity statements described as follows (R. 147):

Article	Style lot	Manufactures	Description	Maximum price
Rayon Goods	Gabardine	Belding	Plain	$0.89
Rayon Goods	Gabardine	Belding	Plain	1.19

It was shown that ten sales of gabardine were made in February 1943, seven sales at $1.00 per yard and one at 1.39 per yard and two at 89¢ per yard (Pltf.'s Exh. 14, 146–147).

To summarize: The sales slips disclosed that 85¢ per yard was the highest price at which Gabardine sold in March 1942. Other sales were made at 39¢ per yard. The only gabardines listed in the two statements have a maximum price of 89¢ and 1.19 per yard. Defendant was in violation:

(1) in having failed to list in its base period statement the kind and quality of gabardine sold in March 1942 at 85¢ per yard;

(2) If defendant handled in March 1942 only the two kinds of gabardine listed in the base period statement, then defendant misstated the maximum price of one, since one of the two kinds listed should have a maximum price of 85¢ per yard; and

(3) In having sold gabardine in February 1943 at 1.39 per yard in excess of even the highest price listed by defendant in its two statements.

(e) *Indian Head.—A yard goods (Par. XIII, 1, (1), 1 (2) and 1 (3) of the Complaint (R. 19–20).—The* testimony disclosed that in March 1942, six sales of Indian Head were made, three at 35¢ per yard, one at 39¢ per yard, one at 40¢ per yard, and one at 42¢ per yard. (Pltf's. Exh. 17, R. 150.) Only two items of Indian Head were listed on the base period and cost-of-living commodities' statements, described as follows:

Article	Style No.	Manufacturer	Description	Maximum price
				Per yard
Indian H		Butlers	White 44	$0.49
Indian H		Butlers	White 54	.59

It was shown that six sales of Indian Head were made in February, 1943, four sales being made at 50¢ per yard and two at 59¢ per yard (Pltf's. Exh. 18, R. 129, 150).

To summarize: The sales slips disclosed that 42¢ per yard was the highest price at which Indian Head sold in March, 1942, other sales were made at 35¢, 39¢, and 40¢ per yard. The items listed in the two statements had a maximum price of 49¢, 50¢, and 59¢ per yard. No kinds of Indian Head having maximum prices in the amounts at which sales were made in March 1942 appear in the two statements. Defendant was in violation:

(1) In having failed to list in its base period statement a kind and quality of Indian Head that sold in March 1942 at 42¢ per yard; and

(2) If defendant handled in March 1942 only the three kinds of Indian Head listed in the base period statement, then defendant has misstated maximum price of at least one kind, since one of the three kinds should have a maximum price of 42¢ per yard.

(f) *Percale, a yard goods. (Par. XIII, m(1), m(2), and m(3) of Complaint (R. 20–21)).*—The testimony disclosed that in March 1942, 19 sales of percale were made, one sale at 18¢ per yard and 18 others at 29¢ per yard (Pltf's. Exh. 19, R. 151–152).

Only one item of percale was listed on the base period and cost-of-living commodity statement described as follows (R. 153):

Article: Plain Percale. Style No.: Golden Star. Manufacturer: Rice Stix. Description: 80 sq. Maximum price: $0.35 per yard.

It was shown that ten sales of percale were made during the month of February 1943 at prices in excess of 29¢ per yard (Pltf.'s Exh. 20, R. 152). When the investigator from the OPA inspected the store during March 1943, she saw a "T" stamp placed upon the percale display. On this T. stamp appeared the price "35¢" with a line marked through it and immediately below the T. price of "33¢" (R. 130).

To summarize: The sales slips disclosed that 29¢ per yard was the highest price at which percale sold in March, 1942. One other sale was made at 18¢ per yard. The only percale listed in the two statements

has a maximum price of 35¢ per yard. Defendant is in violation:

(1) In having failed to list in its base period statement the kind and quality of percale that sold in March, 1942 at 29¢ per yard;

(2) In listing Golden Rod percale purchased from Rice Stix in its two statements as having a maximum price of 35¢ per yard when the maximum price should have been 29¢ per yard; and

(3) In making ten sales of percale in February, 1943, at prices in excess of 29¢ per yard and in offering to sell in March, 1943, percale at 33¢ per yard.

(g) *Burlap, a yard goods.* (*Par. XIII, p. (1), p. (2), and p. (3) of Complaint* (*R. 23–24*)).—The testimony disclosed that in March, 1942 two sales were made of Burlap at a price of 29¢ per yard (Pltf.'s Exh. 22, R. 154). Only one item of Burlap was listed on the base period and cost-of-living commodities' statement described as follows (R. 154):

Article: Burlap. Style No. Manufacturer: Volker. Description: Plain. Maximum price: $0.45.

It was shown that the selling price of Burlap, a yard goods, in March 1943 was 45¢ per yard. (R. 129.)

To summarize: The sales slips disclosed that 29¢ per yard is the highest price at which Burlap sold in March 1942. Defendant was in violation:

(1) In having failed to list in its base period statement the kind and quality of Burlap that sold in March 1942 at 29¢ per yard; and

(2) In listing the Burlap purchased from Volker in its two statements as having a maximum price of

45¢ per yard where the maximum price should have been 29¢ per yard.

(3) In offering Burlap for sale in March 1943 at 45¢ per yard.

(h) *Ticking, a yard goods (Par. XIII, r (1), r (2) and r (3) of Complaint, R. 24–25).*—The testimony disclosed that March 1942 six sales of ticking were made, one at 25¢ per yard, one at 35¢ per yard, and four at 50¢ per yard (Pltf's Exh. 21, R. 153). Only five items of ticking are listed in the base period and cost-of-living commodities' statements described as follows (R. 153–154):

Article	Style lot	Manufacturers	Description	Maximum price
Ticking	4388	Mitchell F	Colored	$0.65
Ticking	Amoskeig	Butlers	Plain	.35
Ticking	4504	C. P. S	Plain	.69
Ticking	Short length	C. P. S	Figured	.65
Liberty Ticking	x5	C. P. S	Striped	.69

It was shown that in March 1943 defendant was selling four grades of ticking, one at 49¢ per yard, one at 65¢ per yard, and two at 69¢ per yard (R. 130).

To summarize: The sales slips disclosed that 50¢ per yard was the highest price at which ticking sold in March 1942. Other sales were made at 25¢ and 35¢ per yard. One item of ticking is listed in the two statements at 35¢ per yard which corresponds with one of the sales made in March 1942. However, there are no tickings listed in the statements at 25¢ per yard and 50¢ per yard. Defendant was in violation:

(1) In having failed to list in its base period statement a kind and quality of ticking that sold in March, 1942 at 50¢ per yard; and

(2) If defendant handled, in March 1942, only the five kinds of ticking listed in the base period statement, then defendant failed to correctly list the maximum price of one which should have a maximum price of 50¢ per yard.

(i) *Spun Rayon, a yard goods.* (*Par. XIII, g (1), par. XIII (a) (b) of the Complaint, R. 15, 10*).— The testimony disclosed that in March, 1942, two sales of spun rayon were made, one at 59¢ per yard and the other at 79¢ per yard (Pltf's Exh. 10, R. 144).

It was shown that spun rayon was neither listed in the cost-of-living commodities' statement (R. 144), nor in the base period statement (Pltf's Exh. 2). It was further shown that two sales of spun rayon were made in February 1943 at 89¢ per yard (Pltf's Exh. 11, R. 145). The inspector for the OPA testified that when she inspected the store in March 1943, defendant had a "T" stamp set on the spun rayon display. A card on the "T" stamp bore the writing "spun rayon, ceiling price 79¢". Inspection of the bolts of spun rayon revealed that the price 89¢ appeared on the ends thereof (R. 129).

To summarize: Defendant was in violation:

(1) In not listing spun rayon sold by it in March 1942 in its base period statement;

(2) In not listing spun rayon in its cost-of-living commodity statement or in a supplement thereto, despite the fact that it sold spun rayon in March 1943; and

(3) In selling spun rayon in February 1943 at 89¢ per yard when its highest price for that material in March, 1942, was 79¢ per yard.

(j) *Jersey, a yard goods (Par. XIII, (a) (b) of the Complaint (R. 10–11)).*—The testimony disclosed that in March 1942 five sales of jersey were made; one at 95¢ per yard, one at $1.19 per yard, and three at $1.65 per yard (Pltf's Exh. 15, R. 148).

It was shown that jersey was not listed in the two statements (R. 149). It was further shown that sixteen sales of jersey in defendant's store in February 1943 at two prices; rayon jersey in plain colors at $1.65 per yard and in prints or patterns at $1.69 per yard (R. 129) and that eleven sales were made at $1.69 a yard (R. 149).

To summarize: Defendant was in violation:

(1) In failing to list jersey in its base period and cost-of-living commodity statements.

(2) In selling jersey at $1.69 per yard in February 1943 where the highest price for jersey in March 1942 was $1.65 per yard.

(k) *Overalls (Par. XIII, r(1), r(2) of the Complaint (R. 24–25).*—The testimony showed that defendant made four sales of overalls in March 1943 at $3.00 a pair (Pltf's Exh. 23, R. 155). The highest price listed for overalls in the cost-of-living commodity statement was $2.50 (R. 155).

To summarize: Defendant has either sold overalls above the ceiling or has failed to list the $3 overall in its cost-of-living commodity statement.

Eugene Sanden explained that the overalls were sold at $3 per pair but were unintentionally left off

the list (R. 202). The court found that the failure to list this merchandise was an error or oversight and entirely without any intent to violate any provision of the Regulation. (Finding of Fact No. 25, R. 79).

(l) *Sateen (Par. XIII, q (1), of the Complaint (R. 24).*—The testimony showed that defendant made one sale of the Sateen at the price of 59¢ per yard in February 1943 (Pltf.'s Exh. 24, R. 156).

Only one item of sateen was listed on the two statements described as follows (R. 156):

Article: Sateen. Manufacturer: Robinson. Description: Colors. Maximum price: 45¢.

To Summarize: 1. No supplements were filed to the original cost-of-living commodity statement. We may assume that defendant was selling in February 1943 the sateen listed in the two statements and having a maximum price of 45¢ per yard. The February 2, 1943, sale at 59¢ per yard was therefore in excess of the price listed in the two statements.

2. If the sateen that sold at 59¢ per yard was of a different kind than that listed in the statements, then defendant is in violation in not having listed it in its cost-of-living commodity statement or in a supplement thereto.

(m) *Eyelette (Par. XIII, h (1), h (2), and h (3) of the Complaint (R. 15–16)).*—The testimony showed only one sale of eyelette was made in March 1942 at a price of 79¢ per yard (Pltf.'s Exh. 12, R. 145).

Only one yard of eyelette was listed in the two statements described as follows (R. 146):

Article: Eyelette. Manufacturer: Robinson. Description: White. Maximum price: $1.00.

To summarize: The sales slips disclosed that the highest price at which eyelette sold in March 1942 was 79¢ per yard. The only item listed in the two statements has a maximum price of $1.00 per yard. Defendant was in violation—

(1) in having failed to list in its base period statement the kind and quality of eyelette that sold in March 1942 at 79¢ per yard; and

(2) in listing eyelette purchased from Robinson in its two statements as having a maximum price of $1.00 per yard when the maximum price should have been 79¢ per yard.

(n) *Canvas.*—The testimony showed that the defendant in March 1943 was selling a cotton canvas at 35¢ per yard (R. 139). An examination of the cost-of-living commodity statement will disclose that no cotton canvas yard goods is listed thereon.

(m) *Failure to Appropriately Describe or Identify Commodities in the Base and Cost of Living Commodity Statement.*—Under sections 1499.11 (b) and 1499.13 (b) each commodity listed in the base period and cost of living commodity statement was required to be appropriately described or identified (R. 73, 75).

Sanden testified that he received a copy of Bulletin No. 2 of the General Maximum Price Regulation from the Office of Price Administration prior to the time the two statements were prepared (Exh. No. 4, R. 123). This bulletin is entitled: "What Every Retailer Should Know About The General Maximum Price Regulation." Beginning at p. 33 there appears the following instruction:

6. How to Identify Merchandise.

The Regulation requires proper identification of merchandise in connection with

1. Display of ceiling prices on cost-of-living items,

2. Preparing the statement of base-period prices to be kept in the store, and

3. Preparing the list of maximum prices of cost-of-living commodities for filing with the local War Price and Rationing Board.

Since the best means of identification will differ among stores, or even for different items in the same store, the Office of Price Administration has not prescribed specific types of information which must be used for identification.

* * * The guiding rule in the case of the statement of maximum prices to be kept for examination by any person is that any item in the store must be readily traceable to an entry in the maximum price statement. Thus, the merchandise might be identified in the statement by the manufacturer's name or a code symbol for it, by the *manufacturer's or retailer's lot number or style number also shown* on the merchandise, by a brand or style name, by the grade label, *by the size* (*where size is a price factor*) or *by an adequate physical description.*

The retailer will be able to answer many of his own questions on identification if he visualizes the uses which will be made of his maximum price statements. For example, if a customer points to a specific item of merchandise in the store and asks to see the statement of its maximum price, the retailer should be able to satisfy

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this request readily by showing the customer a specific entry in the statement. The customer would certainly not be satisfied by an entry reading "Dress—$2.98" or "Cotton Towel—39 cents." It would be clear that some dresses may have a maximum price of $1.98, and some towels a ceiling of 29 cents. The customer could be satisfied if the entry in the record read "Ladies Street Dress, manufacturer 26, Style H 198, ceiling price $2.98" and if the dress tag itself contained corresponding identification.

This whole matter of proper identification is of course most important in terms of the retailer's relations to his customers. But it is also vital to his relations with O. P. A. *If requested by O. P. A., the retailer must be able not merely to associate the price on a specific item of merchandise in the store with a specific entry in his statement of base-period prices or his statement of maximum prices of cost-of-living items, but he must be able to go behind such statements to his invoices or other documents in order to provide fuller evidence as to how he arrived at maximum prices.*

With this guidance as to the use which will be made of these maximum price statements, the retailer should be able to adjust his own situation to fit the requirements. [Italics supplied.]

Reference to defendant's methods shows that it made little, if any, effort to provide identification as to size or physical description even though the price of the commodity was determined by those factors; and even though in the absence of such description it would be almost impossible to compare these prices

with those in his invoices or other documents. Thus, for example, on page 3 of the defendant's Cost-of-living Commodity Statement (Exh. No. 1) turkish towels are described as follows:

Article	Style No.	Manufacturer	Description	Maximum Price
Turkish Towels		C. P. S	Colored	$0.35
Turkish Towels		C. P. S	Colored	.45
Turkish Towels		C. P. S	Colored	.59
Turkish Towels		C. P. S	Colored	.89
Turkish Towels		C. P. S	Colored	1.00
Turkish Towels		C. P. S	Colored	1.39
Turkish Towels		C. P. S	Colored	1.50
Turkish Towels		Butlers	Colored	.35
Turkish Towels		Butlers	Colored	.39

Sanden testified that the letters "C. P. S." means Carson-Pirie-Scott, who supplied the towels (R. 116). He said it was undoubtedly impossible to give any lot number because they may have been on the shelf without any lot number on them (R. 116). His testimony in part was as follows:

> * * * You can get so many different sizes; you can get a very small size on up to a beach size three yards long and two yards wide, extra heavy. Those were identified to the best of my ability (R. 116).

Again, on page four of the statement (Exh. No. 1) appears the following:

Article	Style No.	Manufacturer	Description	Maximum price
Pique		Robinson	White	$0.35
Pique		Robinson	White	.50
Cotton Damask		C. P. S	White	.95
Cotton Damask		C. P. S	White	.75
Cotton Damask		C. P. S	White	.89

Sanden testified that the above represented two qualities of muslin and each had a separate lot number (R. 117).

On page 10 of Exhibit No. 1, dish towels are described as follows:

Article	Style No.	Manufacturer	Description	Maximum price
Br. Muslin	F. of L	Butlers	36	$0.22
Br. Muslin	F. of L	Butlers	36	.19

Sanden testified that the above items represented two different qualities of pique and three different qualities of cotton damask (R. 116, 117).

Further on page 8 of the statement (Exh. No. 1) muslin is described as follows:

Article	Style No.	Manufacturer	Description	Maximum price
Dish Towels		Kitchen Towels Co.	Colored	$0.25
Dish Towels		Kitchen Towels Co.	Colored	.19

These towels likewise were of different qualities and had different lot numbers (R. 118).

Thus also men's mackinaws were described on page 17 as follows:

Articles	Style No.	Manufacturer 4	Description	Maximum price
Men's Mackinaws		Shank house	Plaid	$8.95
Men's Mackinaws		Shank house	Plaid	17.95
Men's Mackinaws		Shank house	Plaid	15.95
Men's Mackinaws		Shank house	Plaid	12.50
Men's Mackinaws		Shank house	Plaid	9.50
Men's Mackinaws	Beaverette Brown		Sheep Lined	5.50
Men's Mackinaws	Beaverette Brown		Sheep Lined	12.95
Men's Mackinaws	Beaverette Brown		Sheep Lined	22.50

The foregoing constitute only some of the commodities that were not appropriately described or identified in the two statements. It is evident that if none of the above items could be identified in the store, then, of course, a commodity in the store could not be traced to the statement.

Sanden attempted to attribute the inadequate description to the fact that lot numbers could not be found. But this would not have prevented defendant from placing a distinguishing mark on the commodities, or describing them in some other way. Apparently the turkish towels could have been distinguished by size, and the other articles, likewise, could have carried a more specific physical description as was required by the Regulation, and as was indicated by the Bulletin.

The two statements, as explained by Bulletin No. 2, were intended to serve a definite purpose. The base period statement was subject to inspection by the purchasing public. It gave the purchaser an opportunity to determine whether he was being overcharged. The cost-of-living commodity statement was intended to reveal the allowable selling prices of such commodities. They also were intended to give the O. P. A. a means of checking to determine if ceiling prices were being violated.

If the descriptions in the statements are such that the commodities in the store cannot be traced to the statements, then obviously the statements are utterly worthless and might just as well have not been prepared at all.

(n) *Failure to Post Prices of Cost-of-Living Commodities.*—By Section 1499.13 (a) of the regulation, every retailer is required to mark the price of every cost-of-living commodity he offers for sale *in a manner plainly visible to, and understandable by the purchasing public.* The maximum price may be marked on the commodity itself or on the shelf, bin, rack, or other holder or container upon or in which the commodity is kept, or it may be posted at the place in the business establishment where the commodity is offered for sale (R. 74).

Commencing on page 22 of Bulletin No. 2 (Exhibit No. 4), the retailer is informed as to how to post his ceiling prices. Whatever method of marking is used, ceiling prices must be displayed on or near the merchandise, easily visible to purchasers. The maximum price must be identified as "Ceiling Price" or "Our Ceiling," and it must be plain to the customer to what merchandise the price refers (R. 75).

The guiding rule is: "Consumers should be able to see the 'Ceiling price' marker clearly when standing at the point of purchase without having to ask or look for it, and without having to thumb through pages."

Dora Clark, inspector for the Office of Price Administration, testified that in March, 1943, when she inspected defendant's store to determine whether the ceiling prices of cost-of-living commodities were posted, she could find no prices posted for jersey, sharkskin, Indian Head, and ticking, all yard goods; for none of the bed spreads; for Wamsutta, Glengary

and Sonoma brand of bed sheets; and none for such commonly used merchandise as women's and girls' dresses; for women's skirts; for men's overalls; for children's hosiery; for children's gloves; and for the majority of men's work pants (R. 127, 128).

Miss Clark went from table to table through the store to determine whether the prices were posted and looked for the ceiling prices on the articles that were being offered for sale (R. 128). Although the ceiling prices were required to be posted in a manner plainly visible to, and understandable by the purchasing public, when Miss Clark inspected each of these items, none were marked with the maximum price (R. 127). She also inspected the entire store and was unable to find any posting or marking of the items in question.

Sanden at first denied that the ceiling prices of all commodities were not posted. Later, he admitted some may have been "overlooked." Relying on his old refrain, he attributed this omission to lack of help in the store (R. 215). Nevertheless, the court found that Defendant at all times displayed its ceiling prices * * * at or near the merchandise and easily visible to customers. (Finding of Fact No. 40, R. 93.)

(o) *Based on number of articles checked, the percentage of violation was 100%.*—Although Sanden attempted to create the impression that a 100% check was made of defendant's store; that the investigators were in his store for approximately three weeks; and that the percentage of error was "one percent or even one-half of one percent", this conclusion was sharply rebutted by the evidence.

Donald Creel, an inspector for the OPA, testified that the investigation ran from March 23 to March 31, 1943 (R. 229), and that he and Miss Clark, his assistant, were in defendant's store to talk to Mr. Sanden and to inspect some merchandise. The sales slips were examined at the Office of Price Administration in Helena. About March 31st, another trip was made to the store to return some sales slips. Creel also went to the store on May 15 (R. 161). He further testified that no attempt was made to make a survey or examination of all of the commodities sold by defendant, but that the investigation was concerned only with the items testified to on the trial (R. 162, 163). Based on the number of articles checked, the percentage of violation is about 100%.

The court's rulings on the sale of yard goods at excess prices and the failure to prepare the statements

On almost each of the violations respecting sales of yard goods in excess of ceiling prices, the court ruled that the material sold in March 1942 was not of the same quality as that sold in February or March 1943 and therefore would not ordinarily sell in the same price line (Findings of Fact 27–31, 36, 37, 39). We do not know how the court could possibly arrive at this conclusion without having before it adequate description and identification of the various commodities sold in March 1942, and these the court declared were not available. Further, if these items were new items, they were required to be listed in the cost-of-living commodity statement or in the supplements thereto.

Why was there no compliance at least on this score? This was defendant's answer in part:

> That refers to keeping that matter up to date, and, as I say, due to the fact that it was a question of keeping the doors open or a question of closing up and getting out the lists, I thought the best things to do would be to take the former course * * * *and then if I had a chance to get some of the stuff out, I would do so.* [Italics added.] (R. 214.)

Then again under Section 1499.2 of the Regulation, if a dealer is unable to price an article not previously handled, according to a similar commodity which he had handled, he must charge the highest prices of a most closely competitive seller. Yet when Sanden was asked whether he did not understand that he was to "shop" a competitor if he was unable to price the new article according to a similar commodity, his answer, quite typical of his defiant attitude throughout was:

> I have never done it and I don't propose to do that. I am not going to shop competitors (R. 226).

Yet the Court found that the "defendant has at all times endeavored in good faith to comply with "each and all the rules and regulations" * * * (Finding of fact 41, R. 93).

The Court also offered no explanation why in some instances, like gabardine, the merchandise was sold or offered for sale at a price even in excess of that set forth in the cost-of-living commodity statement, or why in some instances, like canvas, the merchandise

was not listed in the cost-of-living commodity statement at all (see pp. 38–39, 46, supra).

With respect to the failure to properly list on the base period statement the kinds of material and their prices as of March 1942, the court found that Sanden conferred with Loren Anderson and Stephen T. McDermott, officials of the Office of Price Administration, and

> they, then and there had the understanding that it would be all right for the defendants to prepare said statements by taking the merchandise that was in defendant's store * * * at that time, and pursuant to that understanding, the defendant endeavored to list all the merchandise in said store, and did to the best of his ability (Finding of Fact No. 17).

The record does not support this finding. Sanden testified (R. 202):

> We went over, my sister and I, to see Mr. Anderson and Mr. McDermott, and it was *our* understanding at that time that it would be all right to prepare the list by taking the merchandise that was in the store at that time and listing it together with the merchandise and that would be a satisfactory statement to be listed, a basic price list and a cost of living commodity list. [Italics added.]

In referring to the word "our," Sandem undoubtedly intended to include only his sister and himself, and not also the OPA officials. This is confirmed by the fact that on direct examination Sandem testified that Anderson and McDermott had only told him "generally" what to do with regard to the two state-

ments in question and had given him a Bulletin of instructions (Plaintiffs Exhibit 4, (R. 122–123)). Sandem made no mention of such an "understanding," on direct examination. Moreover, McDermott's testimony squarely rebutted the "understanding."

> The COURT. What did you tell him?
>
> A. We told him every item in his store must be included in his base-period list, reflecting the prices of those items as of March 1942 (R. 192).

It is significant that Sanders never denied ~~Anderson's~~ McDermott's version of what happened. In any event, even if we assume there was such an "understanding" among *all* the parties, it would not be binding upon the Administrator, since the fundamental requirements of the Act and regulation, which are so abundantly clear in this respect, could not be modified or waived by a subordinate (*Nichols & Company* v. *Secretary of Agriculture,* 131 F. (2d) 651, 659 (C. C. A. 1st, 1942); *Securities and Exchange Commission* v. *Torr,* 22 F. Supp. 602, 612 (S. D. N. Y. 1938); *Fleming* v. *Miller,* 47 F. Supp. 1004, 1008 (D. C. Minn. 1942); *Bowles* v. *Jim Jung* (D. C. Cal. May 8, 1944). 2 Op. and Dec. 2035); *Nelson* v. *Secretary of Agriculture,* 133 F. (2d) 453 (C. C. A. 7th, 1943); *Bowles* v. *Sisk,* 144 F. (2d) 163 (C. C. A. 4th, 1944). In the last-mentioned case the court said (p. 165):

> Nor do we see any reason why it [the Regulation] should not be enforced against the defendants, who fall clearly within the provisions. *The fact that certain officials of the Office of Price Administration may have*

> *thought it would not apply to them is, of course, no reason;* and we find no equitable considerations which would justify the Court in refusing to enjoin defendants from its violations. [Italics added.]

Summary of Evidence

In short, the evidence showed that the defendant violated the clear and unambiguous terms of the Regulation in that:

(1) It made numerous sales at prices in excess of the legal maximum of a large variety of goods;

(2) It collected an undetermined amount of money more than it was legally entitled to;

(3) It filed its base and cost-of-living commodity statements about eight months late;

(4) It misstated the prices of commodities in its base period statement;

(5) It failed to file its supplementary commodity statements;

(6) It failed to include in the statements which were required to be filed with the appropriate War Price and Ration Board a large number of articles which should have been included thereon;

(7) It failed to describe with sufficient clarity many of the items scheduled on the statements which it did file; and

(8) It failed to properly post its ceiling prices.

From the foregoing, it must be evident that not only is there no basis for Finding of Fact No. 42 "that defendant had never engaged in any act or practice contrary to the provisions of the Act or of

the regulations," but on the contrary, there is almost conclusive evidence that defendant engaged in nearly every conceivable act and practice contrary to the Act and the Regulations.

Point III

Defendant's license should have been suspended. In any event, an injunction should have been granted

1. On the basis of the large variety, number and persistence of violations recited above, it is submitted that a suspension of defendant's license to do business for some period, pursuant to Section 205 (f) (2) of the Act,[3] would have been the most appropriate relief

[3] Section 205 (f) (2). Whenever in the judgment of the Administrator a person has violated any of the provisions of a license issued under this subsection, or has violated any of the provisions of any regulation, order, or requirement under section 2 or section 202 (b), or any of the provisions of any price schedule effective in accordance with the provisions of section 206, which is applicable to such person, a warning notice shall be sent by registered mail to such person. If the Administrator has reason to believe that such person has again violated any of the provisions of such license, regulation, order, price schedule, or requirement after receipt of such warning notice, the Administrator may petition any State or Territorial court of competent jurisdiction, or a district court subject to the limitations hereinafter provided, for an order suspending the license of such person for any period of not more than twelve months. If any such court finds that such person has violated any of the provisions of such license, regulation, order, price schedule, or requirement after the receipt of the warning notice, such court shall issue an order suspending the license to the extent that it authorizes such person to sell the commodity or commodities in connection with which the violation occurred, or to the extent that it authorizes such person to sell any commodity or commodities with respect to which a regulation or order issued under section 2, or a price schedule effective in accordance with the provisions of section 206, is applicable; but no such suspension shall be for a period of more than twelve months.

in this case. It was said by the Senate Committee which reported the Emergency Price Control Act:

> Rising prices and increases in the cost of living bring misery to our people, cause industrial unrest, and undermine our unity. Since prices do not advance at the same rate for all commodities, and living costs tend to rise more quickly than wages, the burdens of war are haphazardly distributed, with the heaviest burden on the farmer, the salaried worker, the small investor, the pensioner, and the veteran, whose incomes cannot readily be expanded.
>
> Price control which cannot be made effective is at least as bad as no price control at all. It will not stop violation, and enables those who defy regulation to profit at the expense of the buyers and sellers who unselfishly cooperate in the interests of the Emergency (p. 2) (S. Rep. 931, 77th Cong., 2nd Sess. (1942), p. 2).

However, if a license suspension appeared to be a drastic remedy in the light of all the circumstances, then at the very minimum an injunction restraining further violation of the Act and Regulations should have been granted.

It is true that whether an injunction should issue in any case rests in the sound discretion of the court. But as the Supreme Court held in *The Hecht Company* v. *Bowles,* 321 U. S. 321, that discretion should be exercised in the light of the large objectives of the Emergency Price Control Act and should reflect an acute awareness of the admonition of Congress that "of all the consequences of war, except human slaughter, inflation is the most destructive and that delay or indifference may be fatal." Here,

however, the court exercised no discretion in withholding the injunction. Rather, it refused to grant the injunction because it found no violations, although they plainly existed. The court found no violations because of its strange notion that compliance with the Act and Regulation would be so costly as to be excused. The Supreme Court has held this to be thoroughly erroneous. (Cf. *Bowles* v. *Willingham,* supra). Apart from that, in determining whether an injunction should be granted, the court was without authority to consider the fairness of the regulation or its economic effect. These are matters which Congress has properly reserved for the exclusive consideration of the Emergency Court of Appeals (*Yakus* v. *United States,* supra, *Bowles* v. *NuWay Laundry Company,* supra.)

> If the hardships recognized by the trial court as constituting the basis for a denial of the injunction are disproportionate to the common burden of a wartime economy the remedy is adequately provided elsewhere in the Act (Sections 203 (a) and 204 (a) (b) (c) (d), and not in the trial court. The complexities of the problem involved in such a gigantic undertaking renders judicial administration inadequate and inappropriate. In our judgment the public interest fully justified injunctive relief * * * (*Bowles* v. *NuWay Laundry Company, supra,* 141 F. (2d) at p. 748.)

The fairness of the regulation being a matter which the court was not entitled to consider, and the defendant having clearly violated the law and having sought to vindicate its right to do in the future what

it had done in the past, there are present in this case no equitable circumstances which would justify a court to withhold relief. Accordingly, the court erred in denying an injunction (*Bowles* v. *NuWay Laundry Company, supra; Bowles* v. *Simon,* 145 F. (2d) 334 (C. C. A. 7th, 1944).

2. The facts in this case are wholly distinguishable from those in the case of *Hecht Co.* v. *Bowles* (321 U. S. 321).

In the *Hecht Case,* the absolute good faith of the defendant was unquestioned. It made costly efforts to comply with the regulations. It corrected promptly and voluntarily all violations called to its attention. It set up a special price control office to prevent recurrence of mistakes. It proposed to make repayment of all overcharges to customers who could be identified and to contribute the remainder of the overcharges to local charity.

The defendant in this case, unlike the defendant in the *Hecht Case,* took no timely, positive, or vigorous methods to understand the requirements and to meet them. Errors and mistakes were not promptly corrected as soon as they were discovered, in fact, simply were not corrected. Good faith is scarcely apparent where a merchant under complaint reluctantly files base period and cost of living commodity statements eight months late, and then adds "insult to injury" by neglecting to file necessary supplementary statements. Commodities were sold or offered for sale at more than the ceiling price. No effort at all was made by the defendant to improve its record-keeping methods or to make its records

more adequate. Records were kept in such a way as to make it practically impossible to determine whether defendant was living up to the regulations. While defendant asserted its shortage of help as the main excuse for non-compliance, the Administrator offered proof to show that in January, 1943, defendant had more than its average quota of help, while defendant disclaimed knowledge of how many employees it had in February, 1943 (R. 226, 227). It was not for plaintiff to prove that defendant had adequate help (*Brown* v. *Mars,* 135 F. (2d) 850, 856 (C. C. A. 8th, 1943), cert. den. 320 U. S. 798 and cases cited). See also, *The Medea,* 179 Fed. 781, 786 (C. C. A. 9th, 1910). The fact is, as we have shown, defendant's staff was completely intact, except for one employee, until September 1942, but defendant did nothing during June, July, or August toward compliance with the law. No premium should now be placed on its own delay. No benefit should now be drawn from its own neglect.

In every way, therefore, past and present good intentions are wholly lacking here from which to assume that there is no likelihood of avoidable violations and no reason to apprehend them in the future. The defendant cannot and does not plead ignorance of the Act and Regulations. Its acting manager was an attorney who knew or could easily have acquainted himself with both (R. 225). While some individual ceiling price violations might be explained on the basis of lack of experienced help, or an oversight, or an error of interpretation, the large number of price violations, the almost complete absence of basic records

from which proper ceiling prices could be calculated by defendant or checked by the Office of Price Administration, the disparities between prices contained in the base period statement filed and those found in sales vouchers for March 1942, and the avoidance of proper price posting, are conclusive evidence of its systematic flouting of the entire price program.

The fact that relatively few of the total number of transactions of the store, or even of the departments visited, were investigated is not a mitigating factor. The significant factor is that wherever investigation was made, violations were found. At no time during the trial, did defendant attempt to show that compliance in the departments not investigated was any better than compliance in the departments into which inquiry was made, although those facts were also peculiarly within its knowledge. If new merchandise was sold at ceiling prices, it was not due to any effort to comply with the act, but solely to chance. Sales of commodities at unlawful prices were disclosed even *after* the defendant had determined the maximum prices for such commodities and had reported them to the Office of Price Administration. Gross negligence alone could account for such indifferent conduct. Only absolute disregard for the results can explain the number of items sold or offered for sale without being listed, or without establishing their maximum legal prices. As these required records were lacking, neither the public, nor even the Office of Price Administration, could determine whether a customer had been charged the legal price or not.

Even after defendant saw the challenge of its activities that was implied in the investigation, it took no steps to bring its operations into compliance with the Act. Defendant believed that it had a vested right, even in a war period, to continue its "business as usual" habits, which it had found to be so satisfactory and profitable in peace times. There could be no price control at all if every person subject to the Act and Regulation adopted the defendant's attitude in regard to filing supplemental statements "if I had a chance to get some of that stuff out I would do so" (R. 214), or in regard to shopping competitors on new commodities, "I have never done it and I don't propose to do that" (R. 226). Such conduct, if condoned, would inevitably result in price increases beyond all control.

It thus appears that while a defendant piously professed good intentions of complying with the law, in active practice it made the feeblest effort to do so, and then only under compulsion and merely to the extent that no hardship or inconvenience was incurred. This is not the sort of conduct which should receive the approval of a court of equity in determining whether an injunction should be granted in a case so deeply affected with the public interest. The success of the Act is dependent upon the patriotic cooperation of all persons to whom it is applicable. We submit that on this record if ever a case called for an injunction, it is this case.

In *Bowles* v. *Simon,, supra,* 145 F. (2d) at p. 337 the court aptly said:

> * * * considered together with the defendant's uncooperative and hostile attitude toward the Price Control Act, its enforcement and administration, his repeated violations of the regulations governing rent increases and minimum services, and his flagrant disregard for all warnings of the Administrator, constrains us to hold that the District Court abused its discretion in refusing this injunction. An injunction will not only insure better compliance with the Act, but seems essential to make this defendant comply with the Act. *Bowles* v. *NuWay Laundry Company, supra; Bowles* v. *Montgomery Ward & Co.,* 143 F. 2d, 38, 43. We think that this is true, even though the District Court generously found, in the face of defendant's hostility and repeated violations, that he will not commit future violations.

In *Bowles* v. *NuWay Laundry Co., supra,* the court said (p. 748):

> The question remains whether an injunction, authorized by Section 205 (a) of the Act should issue. This suit was filed March 3, 1943, and at that time the Administrator prayed for temporary and permanent injunctive relief. Thereafter he sought without avail to compel appellee to comply with the regulations but his efforts were met with the recalcitrant non-compliance. * * * In our judgment the public interest fully justified injunctive relief in respect to the adjudicated violations and the case is reversed with directions to issue an injunction in accordance with the views expressed therein.

By defendant's own admission, good faith did not prevent its extensive violation in the past; and by the same token, even if its protestations of past good faith are sincere, there is no basis for concluding that good faith alone, without the prodding provided by an outstanding injunction, will any more successfully secure compliance in the future.[4]

If the judgment of the District Court is allowed to stand in this case, it cannot help but operate as an invitation to this defendant and others similarly situated to continue to flout a law "born of the exigencies of war" for the protection of the public against inflation. (See *Taylor* v. *United States,* 142 F. (2d) 808, 817 (C. C. A. 9th, 1944).)

We feel that such a result would not only be unfair to those other merchants who unselfishly and without complaint are complying with the law at great sacrifice of income and profit, but also would gravely endanger price control and nullify its enforcement.

> Any easy attitude which even remotely suggests that the Act may be violated with impunity strikes at the entire enforcement program * * * (*Bowles* v. *Montgomery Ward & Company,* 143 F. (2d) 38, 42 (C. C. A. 7th, 1944)).

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[4] The fact that Defendant vigorously defended his past conduct is of itself a sufficient threat that he will violate in the future as to warrant the issuance of an injunction. *Sears, Roebuck & Co.* v. *Fed. Trade Commission*, 258 Fed. 307 (C. C. A. 7th, 1919); *Otis & Co.* v. *Securities & Exchange Commission*, 106 F. (2d) 579 (C. C. A. 6th, 1939); *Fleming* v. *Jacksonville Paper Co.*, 128 F. (2d) 395 (C. C. A. 5th 1942).

CONCLUSION

We respectfully submit that the judgment of the District Court should be reversed; that defendant's license should be suspended; or as an alternative that it be enjoined from further violating the Act and Regulations.

Respectfully submitted.

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